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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JODY PRESTON MOREHOUSE, Defendant and Appellant.	F076241 (Super. Ct. No. BF163986A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE CONCURRING AND DISSENTING OPINION

INTRODUCTION

Defendant Jody Preston Morehouse approached a stranger in a parking lot, demanded his car keys, threatened him with a knife and an unseen gun, and drove off in the car after the victim fled. Defendant was arrested shortly thereafter following a police pursuit.

After the parties waived a jury trial, the court convicted defendant of the following six offenses: carjacking (Pen. Code, § 215, subd. (a))[1] (count 1); making criminal threats (§ 422) (count 2); misdemeanor vandalism (§ 594, subd. (b)(1)) (count 3); evading a peace officer with wanton disregard for safety (Veh. Code, § 2800.2) (count 4); second degree robbery (§ 212.5, subd. (c)) (count 5); and assault with a deadly weapon (§ 245, subd. (a)(1)) (count 6). The court also found true that defendant personally used a deadly weapon in the commission of counts 1, 2, and 5 (§ 12022, subd. (b)(1)), suffered a prior conviction within the meaning of the "Three Strikes" law (§§ 667, subd. (b)–(i), 1170.12, subds. (a)–(d)), suffered a prior serious felony conviction (§ 667, subd. (a)(1)), and served a prior prison term (§ 667.5, subd. (b)).[2]

The trial court sentenced defendant to a total determinate term of 28 years in prison. On count 1 (carjacking), the court imposed the upper term of 18 years, plus an additional one year for the weapon enhancement, five years for the serious felony enhancement and one year for the prior prison term. On count 2 (making criminal threats), the court imposed a consecutive term of one year four months, plus an additional four months for the weapon enhancement. On court 4 (reckless evading), the court

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] As discussed in part II. of the Discussion, section 667, subdivision (a)(1), and section 1385 were amended effective January 1, 2019, to permit a trial court, in the furtherance of justice, to strike or dismiss the five-year enhancement. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) ch. 1013, § 1, 2 (Sen. Bill No. 1393 or Senate Bill No. 1393).) Section 667.5, subdivision (c)(5), was also amended effective January 1, 2019, but that amendment is not relevant to this appeal. (Sen. Bill No. 1494 (2017-2018 Reg. Sess.) ch. 423, § 65.)

imposed a consecutive term of one year four months. The court also imposed and stayed the following terms pursuant to section 654: the upper term of 10 years on count 5 (robbery), the upper term of eight years on count 6 (assault), and 180 days in jail on count 3 (vandalism).

On appeal, defendant claims that because the criminal threats and carjacking were committed pursuant to a single intent and objective, the trial court erred under section 654 when it failed to stay his sentence for making criminal threats. In supplemental briefing, defendant requests remand so the court may exercise its discretion whether to strike the prior serious felony conviction enhancement under section 667, subdivision (a), in light of the amendments to sections 667 and 1385, effective January 1, 2019. (Sen. Bill No. 1393, ch. 1013, §§ 1, 2.) In addition, he requests remand for a hearing on his eligibility for mental health pretrial diversion under section 1001.36. (Assem. Bill No. 1810 (2017-2018 Reg. Sess.) ch. 34, § 24, pp. 34–37 (Assembly Bill No. 1810).)

The People oppose defendant's requests for relief and request the judgment be affirmed.

We agree with defendant that the trial court should have stayed his sentence for making criminal threats under section 654 and we also agree that he is entitled to remand so the court may exercise its jurisdiction in the first instance with respect to whether to strike or dismiss the prior serious felony conviction enhancement. However, in accordance with our recent decision in *People v. Craine* (2019) 35 Cal.App.5th 744 (*Craine*), we reject defendant's claim that section 1001.36 applies retroactively and entitles him to remand for an eligibility hearing. As modified, we affirm the judgment.

FACTUAL SUMMARY

The victim in this case was a custodian at an adult school in Bakersfield. His shift ended at 10:00 p.m. and, around that time, he was sitting inside his car in the parking lot with the engine running. Someone pounded on the driver's side window and, thinking

the person might be a student who needed something, the victim got out and locked the car using the key fob in his pocket. He left the engine running.

Defendant said something, but the victim did not understand what it was. Defendant then repeatedly demanded the keys to the car. The victim eventually realized what defendant was asking for and said, "[O]h, you are trying to carjack me." Defendant responded, "[Y]eah, give me your keys." The victim told defendant the keys were in the car.

Defendant pulled a 10-inch knife from a knapsack, held it horizontally approximately one foot from the victim's neck, and repeated his demand for the victim's car keys. After the victim again said the keys were in the car, defendant told the victim that he had a gun and stated "[I]f you don't give me the keys I'm going to shoot you." The victim never saw a gun, but he turned around and fled in panic, calling 911 as he ran. Defendant chased the victim for approximately 40 feet and then stopped. Although the victim did not see defendant getting into his car, he saw defendant driving away in it.

A short while later, an officer saw a car that matched the description of the victim's stolen car and initiated a pursuit. After initially yielding, defendant took off and led officers on a high-speed chase. He eventually stopped and was taken into custody. The victim identified defendant and the knife used in the crime, which officers located inside the car. The rear passenger window on the driver's side had been broken out.

DISCUSSION

I. Applicability of Section 654 to Sentence for Making a Criminal Threat

In his effort to obtain the victim's car keys, defendant held a knife toward the victim's throat and then threatened to shoot him with an unseen gun. Defendant was convicted by the trial court of making criminal threats on these bases. Defendant now argues that because the threats and the carjacking were committed pursuant to a single intent and objective—the taking of the victim's car—the trial court erred in failing to stay

his sentence for making criminal threats under section 654.[3] The People disagree. For the reasons that follow, we conclude the trial court should have stayed the sentence.

A. Standard of Review

Section 654, subdivision (a), provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute "expressly prohibits separate punishment for two crimes based on the same act, but has been interpreted to also preclude multiple punishment for two or more crimes occurring within the same course of conduct pursuant to a single intent." (*People v. Vargas* (2014) 59 Cal.4th 635, 642; accord, *People v. Harrison* (1989) 48 Cal.3d 321, 335.) Determining "[w]hether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry …." (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) "We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single '"intent and objective"' or multiple intents and objectives." (*Ibid.*)

We review the trial court's express or implied factual findings for substantial evidence, and its conclusions of law de novo. (*People v. Brents* (2012) 53 Cal.4th 599, 618; *People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5; *People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603.) We "affirm the trial court's ruling, if it is supported by substantial evidence, on any valid ground." (*People v. Capistrano* (2014) 59 Cal.4th 830,

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3 Defendant did not object in the trial court, but, as he asserts, subject to an exception not relevant here, the failure to object to a sentence on section 654 grounds does not forfeit the claim because such a sentence is unauthorized. (*People v. Hester* (2000) 22 Cal.4th 290, 294–295.)

886, fn. 14, overruled in part on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 103–104; accord, *People v. Brents*, *supra*, at p. 618.)

B. Analysis

1. Single Physical Act

The parties focus on whether defendant had multiple criminal objectives rather than whether, at the first step of the analysis, the crimes involved a single physical act. In our view, defendant's claim may be resolved at the first step.

"Whether a defendant will be found to have committed a single physical act for purposes of section 654 depends on whether some action the defendant is charged with having taken separately completes the actus reus for each of the relevant criminal offenses." (*People v. Corpening*, *supra*, 2 Cal.5th at p. 313.) Section 215, subdivision (a), defines carjacking as "*the felonious taking of a motor vehicle* in the possession of another, from his or her person or immediate presence … *accomplished by means of force or fear*." (Italics added.) Section 422, in turn, defines a criminal threat as a willful threat "*to commit a crime which will result in death or great bodily injury to another person*, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety …." (Italics added.)

In this case, defendant pounded on the window of the victim's car and when the victim got out to see what defendant wanted, defendant demanded the car keys, drew a knife and then threatened to shoot the victim if he did not hand over the keys. Defendant's use of a knife and threat to use a gun to obtain the victim's keys caused the victim to flee in panic and abandon his running car, thereby allowing defendant to

complete the carjacking. As the threats underpinning defendant's conviction for making criminal threats also supply the force or fear element underpinning the carjacking offense, the act of making the criminal threats is not distinguishable from the threats that facilitated the carjacking.

The trial court concluded section 654 did not apply to the criminal threats conviction because "the incident crime [(carjacking)] could have been committed without making the threat." This analysis, however, rests on speculation as to the level of force or fear that might have been sufficient to complete the carjacking. The relevant inquiry is not whether it would have been possible for defendant to complete the carjacking without making the threat, but whether "a separate and distinct act can be established as the basis of each conviction …." (*People v. Beamon* (1973) 8 Cal.3d 625, 637; accord, *People v. Corpening*, *supra*, 2 Cal.5th at p. 316.) Defendant's threats were not separate and distinct from the use of force or fear integral to the carjacking offense and, therefore, section 654 applies to his sentence for making criminal threats.

2. Indivisible Course of Conduct

Alternatively, even if we assume for the sake of argument that defendant's crimes involved a course of conduct rather than a single physical act, section 654 still applies because the only reasonable inference supported by the record is that defendant committed both offenses pursuant to a single intent and objective. Generally, "'"[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."'" (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 885, quoting *People v. Rodriguez* (2009) 47 Cal.4th 501, 507, italics omitted.) "'If [the defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the

violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Porter* (1987) 194 Cal.App.3d 34, 38, quoting *People v. Beamon*, *supra*, 8 Cal.3d at p. 639; accord, *People v. Harrison*, *supra*, 48 Cal.3d at p. 335; *People v. Tom* (2018) 22 Cal.App.5th 250, 260.) "Whether the defendant maintained multiple criminal objectives is determined from all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it." (*People v. Porter*, *supra*, at p. 38, citing *People v. Goodall* (1982) 131 Cal.App.3d 129, 148; accord, *People v. Tom*, *supra*, at p. 260.)

In this case, defendant's intent is clearly evidenced by his threats to physically harm the victim if the victim did not comply with his demand for the keys, and there is no evidence in the record of any objective other than completion of the carjacking. The People cite *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190–191, for the proposition that "gratuitous violence against a helpless and unresisting victim … has traditionally been viewed as not 'incidental' to robbery for purposes of … section 654." We find the decision inapt, however.

In *People v. Nguyen*, the Court of Appeal concluded that section 654 did not apply to convictions for robbery and attempted murder where the defendant emptied the cash register in the front of the business while an accomplice took the clerk to the restroom in the back of the business, took his valuables, forced him to lie face down on the floor, and then kicked him and shot him in the back. (*People v. Nguyen*, *supra*, 204 Cal.App.3d at p. 185.) The court reasoned that "at some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime." (*Id.* at p. 191.)

Here, while defendant's threatening conduct escalated from pointing a knife at the victim to threatening to shoot the victim if he did not comply, it did not constitute "gratuitous violence" beyond that incidental to the carjacking. (*People v. Nguyen*, *supra*,

24 Cal.App.3d at p. 190.) Defendant's threat directly furthered his objective to complete the carjacking. In the absence of substantial evidence that defendant harbored multiple criminal objectives in making criminal threats and committing the carjacking, his sentence for making criminal threats must be stayed under section 654. (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 885; *People v. Brents*, *supra*, 53 Cal.4th at p. 618.)

II. Amendment to Section 667, Subdivision (a)(1), Granting Discretion to Strike Prior Serious Felony Conviction Enhancement

A. Background

At the time of defendant's sentencing, the trial court was required to impose the five-year enhancement under section 667, former subdivision (a)(1), based on defendant's prior serious felony conviction. However, effective January 1, 2019, section 667, subdivision (a)(1), and section 1385 were amended to permit a trial court, in the furtherance of justice, to strike or dismiss a five-year enhancement under section 667, subdivision (a)(1). (Sen. Bill No. 1393, ch. 1013, §§ 1, 2.)

In supplemental briefing, defendant seeks remand of this matter so that the trial court may exercise its discretion whether to strike his prior serious felony conviction enhancement. The parties agree that the statutory amendments apply retroactively in this case. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424–425 (*McDaniels*).) The focus of their disagreement is whether remand for resentencing is required.

The People contend that remand is not required because it is clear from the sentencing record that the trial court would not have exercised its discretion to strike the prior serious felony conviction enhancement. In support of this argument, they rely on the trial court's denial of defendant's invitation to strike his prior serious felony conviction pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*), and its selection of the maximum possible sentence. They also point out that the court found no circumstances in mitigation, and it identified defendant's numerous

prior convictions and his unsatisfactory performance on probation and parole as aggravating circumstances. Further, the court commented that although defendant was statutorily ineligible for probation, had he been eligible, the court would have found him unsuitable given his lengthy criminal history.

B. Analysis

In support of their argument that remand is not necessary in this instance, the People cite *McDaniels* and *People v. McVey* (2018) 24 Cal.App.5th 405, 419 (*McVey*) for the proposition that remand is not required where "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] … enhancement." (*McDaniels*, *supra*, 22 Cal.App.5th at p. 425.) As discussed in both decisions, the relevant proposition was articulated by the Court of Appeal in *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, in which the court was tasked with determining whether reconsideration of sentencing was required after the California Supreme Court held in *Romero*, *supra*, 13 Cal.4th 497 that trial courts have the discretion to strike prior convictions.

The defendant in *People v. Gutierrez* was 34 years old, and he attacked two men who were at least 30 years older than he was, resulting in convictions for robbery and attempted robbery. (*People v. Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) The trial court imposed a total aggregate sentence of 18 years 4 months and, during sentencing, the court stated the defendant "was 'clearly engaged in a pattern of violent conduct, which indicates he is a serious danger to society.'" (*Ibid.*) Further, in the context of deciding whether to impose two 1-year enhancements under section 667.5, former subdivision (b), the trial court stated, "'[T]here really isn't any good cause to strike it. There are a lot of reasons not to, and this is the kind of individual the law was intended to keep off the street as long as possible.'" (*People v. Gutierrez*, *supra*, at p. 1896.)

In this case, in contrast, the trial court expressed no comment when it imposed the prior serious felony conviction enhancement. Moreover, the California Supreme Court

has reiterated that "'[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 (*Gutierrez*).)

Post-*Gutierrez*, most of the published cases considering whether remand is appropriate to allow the trial court to exercise its discretion in the first instance have concluded that remand is appropriate, including *McDaniels*, cited by the People. (*People v. Johnson* (2019) 32 Cal.App.5th 26, 69 [Sen. Bills Nos. 1393 & 620]; *People v. Garcia*, *supra*, 28 Cal.App.5th at p. 973 [Sen. Bill No. 1393]; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109–1111 [Sen. Bill No. 620 applying to firearm enhancement]; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081–1082 [Sen. Bill No. 620]; *McDaniels*, *supra*, 22 Cal.App.5th at pp. 427–428 [Sen. Bill No. 620]; cf. *People v. Jones* (2019) 32 Cal.App.5th 267, 274 [concluding trial court would not have dismissed prior serious felony conviction even if it had the discretion to do so and declining to remand matter in light of Sen. Bill No. 1393].) In the minority is *McVey*, also cited by the People.

In that case, the Court of Appeal found that remand "would serve no purpose but to squander scarce judicial resources." (*McVey*, *supra*, 24 Cal.App.5th at p. 419, citing *People v. Fuhrman* (1997) 16 Cal.4th 930, 946 & *People v. Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) The defendant in *McVey* shot a homeless man multiple times, killing the victim, and he received an aggregate sentence of 16 years 8 months. (*McVey*, *supra*, at pp. 409–410.) The Court of Appeal noted that in imposing a 10-year term for

the firearm enhancement, the trial court "described [the defendant's] attitude as 'pretty haunting'" and stated, "'[T]his is as aggravated as personal use of a firearm gets,' and 'the high term of 10 years on the enhancement is the only appropriate sentence on the enhancement.'" (*McVey*, *supra*, at p. 419.)

We do not minimize defendant's crimes in this case and we recognize that the trial court rejected defendant's invitation to strike his prior strike conviction under *Romero*, found no mitigating factors, commented that defendant would be unsuitable for probation had he been eligible, and elected to impose the upper terms in sentencing defendant. However, the disposition in *McVey* should not be divorced from its context: the victim was shot to death; the single enhancement imposed comprised the majority of the defendant's 16-year 8-month prison sentence; and, unlike in this case, the trial court expressly commented on its imposition of the aggravated firearm enhancement term as "'the *only* appropriate sentence on the enhancement.'" (*McVey*, *supra*, 24 Cal.App.5th at p. 419, italics added.) The Court of Appeal concluded that "[i]n light of the trial court's express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement, there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether." (*Ibid.*)

The record in this case, however, does not contain similarly pointed comments regarding the imposition of the prior serious felony conviction enhancement and we decline to speculate what the trial court might do on remand in the absence of such express indication in the record.[4]

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[4] In *People v. Jones*, the Court of Appeal also considered a record that contained similarly pointed comments in the face of striking facts. (*People v. Jones*, *supra*, 32 Cal.App.5th at pp. 273–275.) In that case, the defendant was convicted of attempted premeditated murder, assault with a deadly weapon and assault likely to produce great bodily injury after he violently attacked a bar employee with a knife after the bar closed, an attack that stemmed from a third party's earlier dissatisfaction over how a drink was mixed at the bar. (*Id.* at pp. 269–270.) The defendant committed the crimes only months after being released from prison after serving a

Notably, in *People v. Almanza*, the Court of Appeal initially affirmed judgment and declined to remand the matter to the trial court in light of Senate Bill No. 620. It then granted rehearing, concluding, "We are persuaded … by *McDaniels* and defense counsel that speculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence. This is the case when there is a retroactive change in the law subsequent to the date of the original sentence that allows the trial court to exercise discretion it did not have at the time of sentence." (*People v. Almanza*, *supra*, 24 Cal.App.5th at pp. 1110–1111.) We concur.

Although the record indicates the trial court was not sympathetic in this case, and not without good reason, it remains that at the time defendant was sentenced, the court lacked the discretion to strike or stay the prior serious felony enhancement. Defendant is entitled to be sentenced in the exercise of informed discretion and remand is appropriate so that the trial court may exercise its discretion in the first instance in light of the amendments to sections 667 and 1385. We express no opinion on how the trial court should exercise its discretion on remand. (*McDaniels*, *supra*, 22 Cal.App.5th at p. 428.)

10-year sentence for stabbing his ex-wife multiple times with a knife. (*Id.* at pp. 273–274.) In sentencing the defendant, the trial court stated, "'I've already, I guess, sort of spoken my sense of this case in my ruling on the new trial motion. This gives me obviously, as you know, great satisfaction in imposing the very lengthy sentence here today.' The court noted that, notwithstanding [the] defendant's genial conduct during court proceedings, his actions had displayed a 'temper' that was 'oftentimes triggered by drinking,' along with 'a [penchant] to use knives, apparently.' The court [further] stated [the] defendant had 'earned the sentence here today.'" (*Id.* at p. 274.) In concluding that remand for resentencing in light of Senate Bill No. 1393 was not warranted, the Court of Appeal stated, "Besides not exercising its discretion for leniency when it could have, the trial court made clear its intention to impose the most stringent sentence it could justifiably impose. It stated there was no doubt the verdict was correct, [the] defendant's actions were premeditated, dangerous, senseless and absurd, he attempted to kill [the victim] only a few months after being released from prison where he had been for 10 years, and the court took 'great satisfaction' in imposing the 'very lengthy sentence' it imposed." (*People v. Jones*, *supra*, at pp. 274–275.)

III. Retroactivity of Section 1001.36

A. Section 1001.36

Finally, defendant seeks remand for a determination on his eligibility for pretrial mental health diversion pursuant to section 1001.36, which was added to the Penal Code effective June 27, 2018. (Assembly Bill No. 1810.) "Section 1001.36 [provides for] a diversion program for defendants who suffer from medically recognized mental disorders, 'including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder ….'" (*Craine, supra,* 35 Cal.App.5th at p. 750, quoting § 1001.36, subd. (b)(1)(A).) Subsequently, "the statute was amended to prohibit its use in cases involving murder, voluntary manslaughter, rape and other sex crimes, the use of a weapon of mass destruction, and any offense 'for which a person, if convicted, would be required to register pursuant to Section 290, except for a violation of Section 314[, i.e., indecent exposure].'" (*Craine, supra,* at p. 750, quoting § 1001.36, subd. (b)(2)(B).)

"Subject to numerous caveats and restrictions, trial courts may now 'grant pretrial diversion' when a mentally disordered individual is charged with a misdemeanor or felony offense (other than those previously mentioned). (§ 1001.36, subd. (a).) The defendant must first produce evidence of a mental disorder, which requires 'a recent diagnosis by a qualified mental health expert.' (*Id.*, subd. (b)(1)(A).) Among other requirements, the trial court must be 'satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense,' and a mental health expert must also conclude 'the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment.' (*Id.*, subd. (b)(1)(B), (C).)" (*Craine, supra,* 35 Cal.App.5th at p. 751.)

B. Analysis

Quoting *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted December 27, 2018, S252220 (*Frahs*), defendant contends that section 1001.36 is

presumptively retroactive and although it does not directly reduce punishment, "'it is unquestionably an "ameliorating benefit" to have the opportunity for diversion—and ultimately a possible dismissal—under section 1001.36.'" He concludes that because there is an ameliorating benefit, the statute applies retroactively to all cases not final on appeal. We recently addressed this issue in *Craine,* however, and held that section 1001.36, which by its terms provides for *pretrial* diversion "does not apply retroactively to defendants whose cases have progressed beyond trial, adjudication of guilt, and sentencing." (*Craine*, *supra*, 35 Cal.App.5th at p. 760.)

Under longstanding rules, "[n]o part of the Penal Code 'is retroactive, unless expressly so declared.' (§ 3.) '[T]he language of section 3 erects a strong presumption of prospective operation, codifying the principle that, "in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the [lawmakers] … must have intended a retroactive application."'" (*People v. Buycks* (2018) 5 Cal.5th 857, 880; see *Craine*, *supra*, 35 Cal.App.5th at p. 752.) However, in accordance with the California Supreme Court's decision in *In re Estrada* (1965) 63 Cal.2d 740, 744, "'"[a]n amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date" [citation], unless the enacting body "clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent" [citations].'" (*People v. Lara* (2019) 6 Cal.5th 1128, 1134, quoting *People v. DeHoyos* (2018) 4 Cal.5th 594, 600.) Last year, the California Supreme Court applied what is known as the *Estrada* rule to a ballot initiative that benefitted juvenile offenders as a class, stating, "Proposition 57's effect is different from the statutory changes in *Estrada*, *supra*, 63 Cal.2d 740, and [*People v.*] *Francis* [1969] 71 Cal.2d 66. Proposition 57 did not ameliorate the punishment, or possible punishment, for a particular crime; rather, it ameliorated the possible punishment for a class of persons,

namely juveniles. But the same inference of retroactivity should apply." (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308 (*Lara*).)

As we explained in *Craine*, however, "a statute's potentially ameliorative benefits are not alone dispositive of the issue. (*Lara, supra,* [4 Cal.5th] at pp. 307–309 & fn. 5.) Proposition 57 was held to apply retroactively because it 'reduces the possible punishment for a class of persons,' which permits the inference of retrospective operation, *and* because 'nothing in Proposition 57's text or ballot materials rebuts this inference.'" (*Craine, supra,* 35 Cal.App.5th at p. 754, quoting *Lara, supra,* at pp. 303–304.) While section 1001.36 "confers a potentially ameliorative benefit to a specified class of persons" (*Craine, supra,* at p. 754), we concluded that, in contrast with Proposition 57, retroactive application of the statute would contravene the Legislature's intent evidenced by the statute's plain language and the available legislative history.[5] (*Craine, supra,* at pp. 754–760.)

Defendant relies on *Frahs* for support, but we expressly disagreed with *Frahs* in *Craine,* stating:

> "The *Frahs* opinion concedes the limits of the term 'adjudication,' recognizing the appellant had 'technically been "adjudicated" in the trial court.' (*Frahs, supra,* 27 Cal.App.5th at p. 791 (review granted).) However, *Frahs* concludes this language is not probative of the Legislature's intent because '[t]he fact that mental health diversion is available only up until the time that a defendant's case is "adjudicated" is simply how this particular diversion program is ordinarily designed to operate.' (*Ibid.*) We do not agree with this reasoning. First, '[t]he purpose of those programs is precisely to *avoid* the necessity of a trial.' (*Gresher v.*

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5 The principles underlying statutory interpretation are well established. The court's "'fundamental task … is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.]' [Citation.] 'Because the statutory language is generally the most reliable indicator of that intent, we look first at the words themselves, giving them their usual and ordinary meaning.' [Citations.] 'If the statutory language is unambiguous, then its plain meaning controls. If, however, the language supports more than one reasonable construction, then we may look to extrinsic aids, including the ostensible objects to be achieved and the legislative history.'" (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1105–1106.)

> *Anderson* (2005) 127 Cal.App.4th 88, 111.) Second, the canons of statutory interpretation require scrutiny of the relevant text, 'giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided.' (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387.)" [¶] … [¶]
>
> "Pursuant to the Legislature's own terminology, pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced. Upon reaching this point of 'adjudication,' the 'prosecution' is over and there is nothing left to postpone. (§ 1001.36, subd. (c).) We see this as a clear indication the Legislature did not intend for section 1001.36 to be applied retroactively in cases such as this one. [¶] The above considerations are disregarded in *Frahs*." (*Craine, supra,* 35 Cal.App.5th at pp. 755–756.)

As such, we are unpersuaded by defendant's reliance in this case on the decision in *Frahs*.[6] Defendant advances no arguments that fall outside the scope of *Craine* and in accordance with that decision, we reject his claim for relief. Section 1001.36 does not apply retroactively and, therefore, defendant lacks entitlement to remand for a hearing on his eligibility for relief under the statute. (*Craine, supra,* 35 Cal.App.5th at p. 760.)

DISPOSITION

The judgment is modified to stay the sentence imposed on count 2 (criminal threats) pursuant to section 654. The matter is also remanded to the trial court to exercise its discretion under sections 667, subdivision (a)(1), and 1385 as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1–2, eff. Jan. 1, 2019) and, if appropriate following exercise of that discretion, to resentence defendant accordingly. The trial court is directed to prepare an amended abstract of judgment reflecting the modification to count 2, and the modification, if any, to the serious felony conviction enhancements, and

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6 Recently, the Sixth District Court of Appeal, in *People v. Weaver* (2019) 36 Cal.App.5th 1103, 1120–1121, agreed with *Frahs* and concluded that section 1001.36 applies retroactively.

to forward a certified copy to the appropriate authorities. The judgment is otherwise affirmed.

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MEEHAN, J.

I CONCUR:

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SMITH, J.

DETJEN, Acting P.J., Concurring and Dissenting.

I concur with the majority that Penal Code section 654[1] applies to count 2 and that Jody Preston Morehouse (defendant) is not entitled to a remand for a hearing on his eligibility for relief under section 1001.36. I respectfully dissent, however, from the conclusion that remand is appropriate for the trial court to exercise the discretion to strike defendant's prior serious felony conviction alleged pursuant to section 667, subdivision (a) as granted by Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Senate Bill No. 1393) (Stats. 2018, ch. 1013, § 1). It is not.

Although the amendments made to sections 667, subdivision (a)(1) and 1385 by Senate Bill No. 1393 apply retroactively to defendant's case, remand for the exercise of the discretion created by those amendments is not required when " 'the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement' even if it had the discretion. [Citation.] [¶] The trial court need not have specifically stated at sentencing it would not strike the enhancement if it had the discretion to do so. Rather, . . . the trial court's statements and sentencing decisions [are reviewed] to infer what its intent would have been." (*People v. Jones* (2019) 32 Cal.App.5th 267, 272-273.)

Because the relevant legal analysis involves a determination of what happened at the sentencing in this case, comparing the number of published cases "[p]ost-*Gutierrez*"[2] in which remand was ordered, to the number in which it was not, is of no value. (Maj. opn., *ante*, at p. 11.)

During the sentencing hearing in this case, which included the hearing on defendant's motion to strike pursuant to section 1385 the same serious felony conviction,

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1 Further statutory references are to the Penal Code.

2 *People v. Gutierrez* (2014) 58 Cal.4th 1354.

but "alleged under the Three Strikes law,"[3] the trial court examined defendant's criminal history and the circumstances of his current convictions. In the nearly 20 years leading up to the crimes committed against this victim, defendant had been either on misdemeanor probation or felony parole for numerous prior adult convictions in 26 prior cases. One prior conviction involved an illegal knife. Another prior conviction was for felony grand theft from a person. During the sentencing on that latter prior conviction, the court granted defendant's *Romero* motion. Defendant received five years in state prison.[4] Within seven months of being discharged from parole, defendant committed the offenses constituting the basis for the current convictions. Defendant repeatedly violated the terms of his various grants of probation and parole and continued to reoffend. The court noted only seven months lapsed between defendant's discharge from parole for the felony grand theft person and his commission of the crimes against this victim. The court found the current crimes involved violence and that it was fortunate no one was harmed. The court described how defendant held a 10-inch knife to the neck of the victim, told the

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3 The Attorney General notes the trial court denied defendant's motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, to strike his prior strike conviction. The *Romero* motion did ask the trial court to strike, pursuant to section 1385, the same prior serious felony conviction at issue here. Under *Romero*, a trial court has the discretion to strike prior serious felony conviction allegations pursuant to section 1385 in cases arising under " 'Three Strikes and You're Out.' " (*Romero*, *supra*, 13 Cal.4th at p. 504.) A trial court may strike such a strike in the furtherance of justice if, after considering certain factors, it determines the defendant is deemed outside the spirit of the scheme of the Three Strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 160-161.) The Three Strikes law is found in sections 667, subdivisions (b) through (i) and 1170.12. (See *Williams*, *supra*, at p. 152 & fn. 1.) The prior serious felony conviction at issue here was alleged pursuant to section 667, subdivision (a). That section is not within the scheme of the Three Strikes law. However, the findings the trial court made during its ruling under *Romero* are relevant to the analysis of what conclusion the trial court would have reached on the section 667, subdivision (a) enhancement if it had, at the time of the sentencing, discretion to strike it.

4 The People explained at sentencing that the facts of the prior conviction for felony grand theft from a person consisted of conduct that was "very similar" to what happened in the current offenses: defendant used a weapon; there was a vehicle involved; he took property from another using force or fear; and he resisted arrest.

victim he would shoot him if the victim did not give him the keys to the victim's car, and then chased the victim when the victim ran. The victim thought defendant was going to kill him, and defendant's actions caused the victim blood pressure and anxiety issues. The court noted defendant's mental health issues and desire to change, then commented such change would be necessary for public safety. The court found no factors in mitigation.

At the original sentencing, the trial court had four discretionary choices to make. First, the conviction in count 1, carjacking (§ 215, subd. (a)), carried three possible terms: three, five, or nine years in state prison. (§ 215, subd. (b).) The decision on which term is chosen rests within the sound discretion of the court. (§ 1170, subd. (b).) The court chose the upper term. Second, the conviction in count 5, second degree robbery (§ 212.5, subd. (c)), carried three possible terms: two, three, or five years in state prison. (§ 213, subd. (a)(2).) The court chose the upper term. Third, the conviction in count 6, assault with a deadly weapon (§ 245, subd. (a)(1)), carried three possible terms: two, three, or four years in state prison. (*Ibid*.) The court chose the upper term. Fourth, the court had the discretion to either impose or strike the prior prison term enhancement. (§§ 667.5, subd. (b), 1385, subd. (a); *People v. Bradley* (1998) 64 Cal.App.4th 386, 395.) It exercised its discretion to impose it.

The trial court imposed the maximum term allowed and it exercised every discretionary opportunity to do so. To say it is not clear what the court would have done if it had also had the discretion to strike the serious prior conviction found true pursuant to section 667, subdivision (a), is unsupported by the record. Remand is not appropriate.

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DETJEN, Acting P.J.